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No. 2729

United States

Circuit Court of Appeals

For the Ninth Circuit.

ENNIS-BROWN COMPANY, a Corporation,
Appellant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Northern District of the State of California.

IN EQUITY—(No. 88).

ENNIS-BROWN COMPANY, a Corporation,
Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation.
Defendants.

(Complaint in Equity.)

To the Honorable Judges of the District Court of the United States for the Northern District of the State of California, in Equity:

The complainant, Ennis-Brown Company, for cause of action against said defendants, alleges as follows:

I.

That complainant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California, and is, and at all times herein mentioned was, a resident and citizen of the State of California, in and for the Northern District thereof.

II.

That the defendant, Central Pacific Railway Company, is and was at all the times herein mentioned, a corporation organized and existing under the laws of the State of Utah, and a resident and citizen of said State of Utah.

III.

That the defendant, Southern Pacific Company is, and [1*] was at all times herein mentioned, a corporation, organized and existing under the laws of the State of Kentucky, and a resident and citizen of said State of Kentucky.

IV.

That complainant is, and at all the times herein mentioned was, the owner in fee simple absolute of, in and to the following described lands: All of that certain piece or parcel of land lying, situate and being in the city of Sacramento, county of Sacramento, State of California, particularly described as follows:

BEGINNING at a point on the Westerly line of Front Street two hundred and thirty-seven (237) feet South of a point where the Southerly line of J Street, if extended Westerly to the Westerly line of Front Street, would intersect the Westerly line of Front Street, running thence northerly along said Westerly line of Front Street two hundred and seventy-seven (277) feet, thence at right angles Westerly to the Sacramento River, thence southerly along the meanderings of said river to a point where a line drawn parallel with the Southerly line of J Street, if extended to the river and distant Southerly therefrom two hundred and thirty-seven (237) feet, would intersect said river, thence Easterly in a line parallel with the Southerly line of J Street to the place of beginning.

V.

That the value of the above-described premises is

*Page-number appearing at foot of page of original certified Record.

in excess of the sum of five thousand ($5,000) dollars.

VI.

That the defendants, and each of them, claim an estate or interest in and to the above-described real property adverse to complainant; that such claim is without right and that defendants have not, nor has either of them, any estate, right, title or interest in or to said real property or any part thereof; but said claim of said defendants, and each of them, is without right, legal or equitable.

VII.

That the defendant, Central Pacific Railway Company [2] is not in possession of the above-described premises, or any part thereof.

TO THE END, THEREFORE, that the said defendants may, if they can, show reason why complainant should not have relief, may it please your Honors to require said defendants, and each of them, to set out the source and nature of their claims, respectively, and that such claims, and each of them, be adjudged to be without right, legal or equitable, and of no force or effect, and that said defendants, and each of them, be perpetually enjoined from asserting any claim, estate, right or interest in or to said real property, or any part thereof; and complainant further prays for such other and further relief as the equities of the case may require and to your Honors may seem meet; and for costs of suit. And complainant will ever pray.

BURRELL G. WHITE,

Attorney for Complainant. [3]

[Verified. Filed June 27, 1914. [4]

Answer of Defendants.

Come now the above-named defendants and answer complainant's complaint as follows:

I.

Aver that the defendants are, and each of them is, without knowledge of the facts upon which the plaintiff relies as the basis of its alleged cause of action in equity.

II.

Deny that complainant is now, or at all, or at any of the times mentioned in the complaint, or at any other time, was, or is, or has been, the owner in fee simple absolute, or the owner of any interest, right, title or claim whatsoever in and to the lands described in paragraph IV of the complaint, or in or to any part of the said lands described in paragraph IV of the complaint; but, on the other hand, aver that the defendant Central Pacific Railway Company (a corporation), is the owner in fee simple absolute of all of the lands described in the complaint, and that it is in possession of the said lands through the defendant Southern Pacific Company, (a corporation), as its lessee, and that the said defendant Central Pacific Railway Company and its predecessors in interest have been [5] the owners in fee simple absolute, and in the possession of the said lands continuously for more than fifty years last past.

III.

Admit that the said defendants, and each of them, claim an estate or interest in and to the real property

described in the complaint, and that the said estate or interest of said defendant Central Pacific Railway Company, (a corporation), is a fee simple absolute, and that the said claim and interest and estate is adverse to the complainant, and that the said estate or interest of said defendant Southern Pacific Company (a corporation), is as lessee of said Central Pacific Railway Company, (a corporation), and that said claim and interest and estate is adverse to the complainant. Deny that such claim of said defendants, or either of them, is without right, or that the defendants, or either of them, have not any estate or right or title or interest in and to said real property, or any part thereof, or that the claim of said defendants, or either of them, is without right, either legal or equitable, or otherwise, but, on the contrary, these defendants aver that the claim of title of the said defendants, and each of them, is with right, both legal and equitable.

IV.

Deny that the defendant Central Pacific Railway Company is not in possession of the premises described in the complaint, or any part of said premises, but, on the other hand, aver that the said Central Pacific Railway Company is in possession of the said real property through the said defendant Southern Pacific Company by lease and agreement made by the predecessor in interest of the said Central Pacific Railway Company to the said Southern Pacific Company, and avers that the said defendant Southern Pacific Company [6] is in possession of the said real property, and every part thereof, claim-

ing under and by virtue of the said Central Pacific Railway Company, and claiming adversely against the said complainant, and all other persons, except the said Central Pacific Railway Company. Aver that the said Central Pacific Railway Company claims to be the owner in fee simple absolute of the said property, subject to the possession of the said Southern Pacific Company, under said lease and agreement hereinbefore referred to, and that the said Central Pacific Railway Company has acquired title to said real property from all persons, of every kind and description, who ever, at any time, had any right, title, claim or interest in and to the said property, or any part thereof.

For a further, separate and second defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 318 of the Code of Civil Procedure of the State of California.

For a further, separate and third defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 319 of the Code of Civil Procedure of the State of California.

For a further, separate and fourth defense herein the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 322 of the Code of Civil Procedure of the [7] State of California.

For a further, separate and fifth defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 323 of the Code of Civil Procedure of the State of California.

For a further, separate and sixth defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 325 of the Code of Civil Procedure of the State of California.

For a further, separate and seventh defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 326 of the Code of Civil Procedure of the State of California.

For a further, separate and eighth defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of subdivision 1, section 337 of the Code of Civil Procedure of the State of California.

For a further, separate and ninth defense herein, the said defendants aver as follows: [8]

I.

That the complainant's alleged cause of action is barred by the provisions of subdivision 1, section 338 of the Code of Civil Procedure of the State of California.

For a further, separate and tenth defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of subdivision 1, section 339 of the Code of Civil Procedure of the State of California.

For a further, separate and eleventh defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California. **[9]**

For a further, separate and twelfth defense to complainant's alleged cause of action, defendants aver:

I.

That in the year 1863, Central Pacific Railroad Company of California, a corporation formed, organized and existing under the laws of the State of California, and the predecessor in interest of the said defendants, entered into possession of the said real property and lands described in the complaint, and that it and its successors in interest, including these defendants, have ever since been in the actual and physical possession of the said real property and of the said lands, and during all of said time the said real property and lands have been, and are now, used by the said defendants and their predecessors in interest as a part of the railroad terminal of said defendants and their predecessors in interest in the city of Sacramento, county of Sacramento, State of Cali-

fornia, and that during all of said time the said real property and the said lands have been, and now are, part of the railroad system of Central Pacific Railway Company, (a corporation), and all of its predecessors in interest, and of Southern Pacific Company, under lease and agreement of the predecessor in interest of the said Central Pacific Railway Company.

II.

That the said Central Pacific Railroad Company of California and its successors in interest, ever since 1863, have, and the said defendants, as such successors, do now maintain upon said property, valuable and extensive railroad works and improvements and railroad tracks, and that now, and for many years last past, the said railroad works and improvements have, and do now, constitute a part of the railroad system of the said Central Pacific Railway Company, which runs from Ogden, in the State of Utah **[10]** through portions of the State of Utah, and through the State of Nevada, and through portions of the State of California, and over and through the property described in the complaint, and connected up by tracks with other property of other railroad corporations, and that ever since 1863 the said railroad tracks, works and improvements on the said real property described in the complaint have been, and now are, used and employed by the said defendants and their predecessors in interest, in interstate commerce, as well as intrastate commerce, by virtue of the fact that the said Central Pacific Railway Company, and its predecessors in interest, and the said Southern Pacific Company have been, and now

are, common carriers of freight and persons for hire.

III.

That ever since 1863 vast and large sums of money have been expended by the said defendants and their predecessors in interest, in constructing, maintaining and operating buildings and structures upon the said property, as a part of the said system. That a part of the said property is covered by the railroad freight sheds of the said defendants, and the balance of said property by railroad tracks and other improvements of the said defendants, all of which has been, during the said period of time, and now are, devoted to public use. That the said complainant, and its predecessors in interest, have stood by and permitted the said defendants, and their predecessors in interest, to expend large sums of money in the construction, maintenance and operation of the said improvements and railroad works and tracks, with the knowledge of the said defendants and their predecessors in interest claiming to own the said lands in fee simple absolute, and have never made any claim to the said defendants, or either of them, until the commencement of the present action, that the said complainant, or its predecessors **[11]** in interest, ever claimed any right, title, claim or interest in and to the said lands, or any part thereof. That the said complainant and its predecessors in interest have expressly and impliedly acquiesced in and consented to the entry of the said defendants and their predecessors in interest upon the lands described in the complaint, and in the construction, operation and maintenance of the said railroad

works and improvements and structures hereinbefore referred to, and for more than fifty years last past have never made any objection of hinderance thereto. That the railroad tracks over and through the lands described in the complaint are used, and have been for many years last past used, by the said defendants for the construction, operation and maintenance of the main line tracks, which connect and have connected, the city of Sacramento with the said railroad system and with other places in the State of California, and with cities and towns in other States of the United States. That the said property contains, and has for many years contained, other tracks, which are used, and are now being used, for switching and terminal purposes in the reception and delivery of freight in connection with the said railroad system, and along the east side of the said property described in the complaint, together with property adjoining the same on the north and south there is now, and has been, constructed and maintained by the said defendant, and their predecessors in interest, a large structure, known as the Sacramento Freight Sheds of the said defendants, and to the west thereof, during said time, have been located, and are now located, the tracks leading to and from the said freight sheds, as well as the main line tracks, and to the west thereof and bordering upon the Sacramento River, there have been, and during all of said time have been, maintained and operated by the said defendants, and their predecessors **[12]** in interest, wharves used by the said defendants and their predecessors in interest in connection with the said

railroad system, and as means of receiving and discharging freight to and from steamers, which constitute, and for many years last past has constituted, a part of the system of the said defendants in connection with the said railroad system. The said steamers, during all of said time, have and do now ply upon the Sacramento River in carrying freight to and from the city of Sacramento, and which is handled by the said defendants as a part of its railroad system, also as a part of its steamer system. That if the said complainant succeeds in establishing title to the said lands described in the complaint, or any part thereof, and obtains possession thereof, the railroad system of the said defendants, as well as the steamer system of the said defendants, will be interfered with and broken, and the said defendants prevented from carrying freight and passengers to and from the city of Sacramento to other points within the State of California, and to and from other States, and, thereby, great and irreparable public loss will be sustained. That for more than fifty years last past the said complainant and its predecessors in interest have stood silently by and permitted the system of the said defendants and its predecessors in interest to grow and expand, and the property described in the complaint to be used as a part of the said system, and large sums of money to be expended by the said defendants upon the faith thereof, and never, at any time, objected to the right of the said defendants and their predecessors in interest to use the said property, as a part of its railroad and

steamer system, but at all times consented and acquiesced in and to the use of the same by the said defendants and their predecessors in interest. Defendants, therefore, aver, in equity and good conscience, that the said complainant is now estopped to **[13]** claim any right, title, claim or interest in and to the property described in the complaint, or any part thereof. That the alleged cause of action in equity of said complainant is barred by its laches, and the laches of its predecessors in interest. That the alleged cause of action is stale and presents no equity. That the said complainant does not come into equity with clean hands. That prior to the commencement of the present action in equity, complainant, or its predecessors in interest, have never asserted any claim or title to the lands described in the complaint, or any part of such lands. That if the said complainant, or its predecessors, ever had any interest or estate in and to said property, the said defendants and their predecessors in interest could have acquired the same by law of the eminent domain, under the laws of the State of California, as each of the same is, and has been, ever since its organization, a steam railroad corporation, engaged in the business of a common carrier of persons and freight for hire. That all of the lands described in the complaint are necessary to the said public use in charge of the said defendants.

WHEREFORE, said defendants pray that complainant take nothing by this action, that the same may be dismissed, and that they may recover their costs of suit, and for such other, further and differ-

ent relief as the facts pleaded and proven will warrant and justify.

Dated September 4th, 1914.

E. J. FOULDS,
WM. H. DEVLIN,
ROBT. T. DEVLIN,
DEVLIN & DEVLIN,

Attorneys and Solicitors for Defendants. **[14]**

[Verified. Filed Sept. 5, 1914.] **[15]**

(Amended Bill.)

To the Honorable Judges of the District Court of the United States for the Northern District of the State of California, in Equity.

The complainant, Ennis-Brown Company, in pursuance of the order of the Court heretofore given and made herein, files this amended bill, and for cause of action against said defendants, alleges as follows:

I.

That complainant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California, and is, and at all times herein mentioned was, a resident and citizen of the State of California, and the Northern District thereof;

II.

That the defendant, Central Pacific Railway Company, is and was at all the times herein mentioned, a corporation, organized and existing under the laws of the State of Utah, and a resident and citizen of said State of Utah;

III.

That the defendant, Southern Pacific Company, is and was [16] at all the times herein mentioned, a corporation, organized and existing under the laws of the State of Kentucky, and a resident and citizen of said State of Kentucky;

IV.

That complainant is, and at all the times herein mentioned was, the owner in fee simple absolute of, in and to the following described lands: All of that certain piece or parcel of land, lying, situate and being in the city of Sacramento, county of Sacramento, State of California, particularly described as follows:

Beginning at a point on a line parallel with and eighty (80) feet West of the East line of Front Street two hundred and thirty-five (235) feet South of a point where the Southerly line of J Street if extended Westerly to said line would intersect said line; running thence Northerly in a line parallel with said East line of Front Street two hundred and seventy-five (275) feet; thence at right angles Westerly to the Sacramento River; running thence Southerly along the meanderings of said river to a point where a line drawn parallel with the Southerly line of J Street if extended to the Sacramento River and distant Southerly therefrom two hundred and thirty-five (235) feet would intersect said river; running thence Easterly in a line parallel with said Southerly line of J Street if extended as aforesaid to the place of beginning.

V.

That the value of the above-described premises is in excess of the sum of five thousand ($5,000) dollars;

VI.

That the defendants, and each of them, claim an estate or interest in and to the above-described real property adverse to complainant; that such claim is without right and that defendants have not, nor has either of them, any estate, right, title or interest in or to said real property or any part thereof; but said claim of said defendants, and each of them, is without right, legal or equitable; [17]

VII.

That the defendant, Central Pacific Railway Company, is not in possession of the above-described premises, or any part thereof;

VIII.

That the defendant, Southern Pacific Company, is now and at all times herein mentioned was, a public service corporation and as such corporation is now, and at all the times herein mentioned was, in possession of, and using the land hereinabove described.

TO THE END, THEREFORE, that the said defendants, may, if they can, show reason why complainant should not have relief, may it please your Honors to require said defendants, and each of them, to set out the source and nature of their claims respectively and that such claims, and each of them, be adjudged to be without right, legal or equitable, and of no force or effect, and that said defendants, and each of them, be perpetually enjoined from asserting any claim, estate, right or interest in or to said real

property, or any part thereof; and complainant further prays for such other and further relief as the equities of the case may require and to your Honors may seem meet; and for costs of suit. And complainant will ever pray.

BURRELL G. WHITE,
Attorney for Complainant. [18]

[Verified. Filed June 4, 1915.] [19]

Amendment [to Amended Bill].

Comes now the complainant and, with the consent of the Court first had and obtained and in response to the motion of defendants, filed herein, for a better statement and further and better particulars, makes and files the following amendment to and of its amended bill, the same to become and be paragraph IX thereof:

IX.

The defendants Southern Pacific Company and Central Pacific Railway Company are, and each of them is, engaged in the general business of railroad corporations as common carriers of passengers and freight, and said Southern Pacific Company maintains upon and over a portion of the property described in the amended bill filed herein a railroad main track over and upon which it operates trains in the exercise of its said business;

To prevent the maintenance and operations of said railroad track would interfere with the service of said defendant Southern Pacific Company to the general public in the city of Sacramento and in the county of Sacramento, and elsewhere;

On other portions of said property said Southern Pacific [20] Company maintains other railroad tracks which are switching tracks and a large structure known as the Sacramento Freight Sheds, and sheds used as a wharf bordering upon the Sacramento River. The public interest neither of the inhabitants of the city of Sacramento nor or the county of Sacramento, nor of any other community requires the maintenance of continuance of said last mentioned tracks or said sheds by said Southern Pacific Company. All of said tracks herein mentioned and sheds are used exclusively by the defendant Southern Pacific Company, and said company claims that as a public service corporation it is entitled to the continuous and exclusive use of said tracks, sheds and the land upon which the same are situated.

The four most important business streets in the city of Sacramento running toward the Sacramento River are I, J, K and L Streets; that said land is situated near the foot of said streets, borders upon the Sacramento River and, together with the land adjacent thereto, is the most convenient point for the shipment of freight into and from the city of Sacramento; that the commerce of the city of Sacramento by water is approximately one-half of the commerce of said city; that the public interest of the citizens of the city of Sacramento and of the county of Sacramento and thereabouts requires that said property should not be used exclusively by said defendant Southern Pacific Company; that the use of said property by said Southern Pacific Company is subordinate to the requirement of public interest that

the land upon which said sheds are built should be open to use by others than said defendant, Southern Pacific Company, and to the title and rights of the complainant therein and thereto.

BURRELL G. WHITE,
Attorney for Complainant. [21]

[Verified. Filed June 21, 1915.] [22]

(Stipulation and Order Extending Time to Answer.)

IT IS HEREBY STIPULATED AND AGREED that the defendants in the above-entitled action may have and they are hereby granted to and including the 1st day of September, A. D. 1914, within which to file answer to the complaint in said action.

This stipulation need not be filed.

Dated the 3d day of August, A. D. 1914.

BURRELL G. WHITE,
Attorney for Complainant.

So ordered.

Dated August 10th, 1914.

WM. C. VAN FLEET,
Judge.

[Filed August 10, 1914.] [23]

(Stipulation Extending Time to Answer.)

IT IS HEREBY STIPULATED that the above-named defendants may have to and including September 5th, 1914, in which to answer complainant's complaint in the above-entitled suit.

Dated August 27th, 1914.

BURRELL G. WHITE,
Attorney for Complainant.

[Filed August 31, 1914.] [24]

At a stated term, to wit, the March term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 1st day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Order Setting Suit for Trial.)

Ordered that the sixteen above-entitled causes be and the same are hereby set for trial on May 25, 1915, at Sacramento. [25]

Memorandum of Points and Authorities on Behalf of Defendant.

III.

The answer of the defendants, particularly the twelfth defense, shows that the defendants are in possession, and that the plaintiff is not. This, in itself, is sufficient in equity to constitute an action to quiet title in defendants in the Federal Court.

Baum v. Longwell, 200 Fed. 450.

[Filed October 30, 1914.] [26]

Notice of Motion to Transfer Cause to Law Side of the Court.

To the Complaint Above Named and Burrell G. White, Its Attorney:

You and each of you will please take notice that the defendant above named will, on Monday the 24th day of May, 1915, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, in the courtroom of said court in the County Courthouse Building, of the County of Sacramento, State of California, at Sacramento, California, then and there move said Court to transfer said cause to the law side of the Court with such alterations in the pleadings as may be essential, pursuant to Equity Rule 22. Said motions will be based upon all of the pleadings, records and files herein, and upon this notice.

Dated this 19th day of May, 1915.

E. J. FOULD,
DEVLIN & DEVLIN,
Attorneys for Defendants.

Service of the within Notice is admitted this 19th day of May, 1915.

BURRELL G. WHITE,
Attorney for Complainant.

[Filed May 20, 1915.] [27]

At a stated term, to wit, the April term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of Sacramento, on Wednesday, the 26th day of May, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

Order Granting Defendants' Motion to Transfer Cause to Law Side of Court.

Defendants' motion to transfer cause to the law side of court came on this day to be heard, and after argument by counsel for both sides was submitted to the Court for consideration and decision and the same being fully considered and the Court having rendered its opinion orally, it was, in accordance with said opinion, ordered that said motion be and the same is hereby granted, unless plaintiff file an amended bill of complaint within ten days. Further ordered that this suit be and the same is hereby continued for the term. [28]

Notice of Motion to Dismiss Action.

To the Above-named Complainant and Its Attorney:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that on Monday, the 21st day of June, 1915, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the court-room of the above-entitled court, in the United States

Postoffice Building at Seventy and Mission Streets, in the City and County of San Francisco, State of California, the said defendants, jointly and severally, will move the said Court to dismiss the above-entitled suit upon the following grounds:

I.

That the facts alleged are insufficient to constitute a valid cause of action in equity against the said defendants, or either of them.

II.

That the liability is not asserted against all of the material defendants, in this, that it appears from the amended complaint that the claim is made against the defendant Central Pacific Railway Company, that it has no title or interest in the property, and plaintiff against it seeks to have its claim thereto, quieted, while against the defendant Southern Pacific Company it is claimed that it is in possession of the property and that the plaintiff, therefore, [29] is entitled to damages upon the payment of which, when ascertained, the said defendant will be entitled to an interest in the property.

III.

That two causes of action are set forth, as hereinbefore stated, and it does not appear that there are sufficient grounds for the uniting of said two causes of action in one bill or complaint, in order to promote the convenient administration of justice.

IV.

Because it does not appear upon the face of the bill that the plaintiff was the owner in fee of the property

at the time the defendant Southern Pacific Company took possession.

Should the motion to dismiss the entire action be deemed too broad, then the said defendants, jointly and severally, will move the said Court to dismiss the alleged cause of action against the defendant Southern Pacific Company, on the ground that it does not appear that an action to quiet title will lie against it while in possession of the property and, further, that if the said plaintiff has any remedy at all it is an action at law for damages, and that it does not appear that the said plaintiff was the owner in fee simple, or in possession of the property at the time the said defendant Southern Pacific Company took possession of the said premises.

Upon the hearing of said motion, said defendants will rely upon the amended complaint and upon the records of said cause and the papers on file.

Dated June 12th, 1915.

E. J. FOULDS,
ROBT. T. DEVLIN and
WM. H. DEVLIN,
DEVLIN & DEVLIN,
Attorneys for Defendants.

[Filed June 15, 1915.] [30]

(Opinion) [Filed Dec. 1, 1915].

BURRELL G. WHITE, of San Francisco, for Complainant.

E. J. FOULDS, of San Francisco, and DEVLIN & DEVLIN, of Sacramento, for Defendants.

VAN FLEET, District Judge:

This is one of several actions (the numbers of which are in the margin) of a precisely similar character, commenced at the same time against these defendants, affecting the title to contiguous portions of the river front in the City of Sacramento. Excepting only as to the name of the plaintiff and the particular parcel of land involved, the bills are in all respects uniform in their averments, and a statement of the facts set forth in the instant bill will serve for all. In form the action is one to quiet title, and omitting the jurisdictional averments and description of property, the material facts set up in the amended bill are in substance these: [31]

That the complainant "is and at all the times herein mentioned was the owner in fee simple" of the property described, and that the defendants and each of them claim an estate or interest in such property adverse to the plaintiff, which claim is without right, and defendants have not, nor has either of them, any estate, right, title or interest in or to the property or any portion thereof; that the defendants are and each of them is engaged in the general business of railroad corporations as common carriers of passengers and freight; "that the defendant Central Pacific Railway Company is not in possession of the

premises involved or any part thereof," but the defendant Southern Pacific Company "is now and at all the times herein mentioned was in possession and using the land hereinabove described"; that it "maintains upon and over a portion of the property described in the amended bill herein a railroad main track, over and upon which it operates trains in the exercise of its said business" and "to prevent the maintenance and operation of said railroad track would interfere with the service of said defendant Southern Pacific Company to the general public"; that on the other portions of said property "said Southern Pacific Company maintains other railroad tracks which are switching tracks, and a large structure known as the Sacramento Freight Sheds, and sheds used as a wharf bordering upon the Sacramento River." It is then alleged that "the public interest neither of the inhabitants of the City of Sacramento nor of the County of Sacramento, nor of any other community, requires the maintenance or continuance of said last mentioned tracks or said sheds by said Southern Pacific Company. All of said tracks herein mentioned and sheds are used exclusively by the defendant Southern Pacific Company, and said company claims that, as a public service corporation, it is entitled to the continuous and exclusive [32] use of said tracks, sheds, and the land upon which the same are situated." Then follows an averment the materiality of which has not been suggested and is not perceived, as to the location of the property involved with reference to the main business streets of the City of Sacramento and its im-

portance, as a part of the waterfront for shipping purposes, in the commerce of the city, and "that the public interest of the citizens of the City of Sacramento and of the County of Sacramento and thereabouts requires that said property should not be used exclusively by said defendant Southern Pacific Company," but that such use "is subordinate to the requirement of the public interest that the land upon which said sheds are built should be open to use by others than said defendant."

The amended bill was filed in response to an order of the Court, made in each case on motion of defendants, directing that the cause be transferred to the law side unless plaintiff should so amend its bill as to disclose a cause of action cognizable in equity, the Court being of opinion that the original bill was lacking in that respect. The material changes in the bill in its amended form are the averments as to the character of the defendants as common carriers or public service corporations, the nature and purpose of the occupation of the premises by the defendant Southern Pacific Company, and the last averment of the bill above adverted to.

The defendants now move to dismiss the bill as amended on the ground that it fails to state a cause of action as against either defendant cognizable either in equity or at law; the objection as to the defendant Central Pacific Railway Company being that, while it is alleged that that defendant is not in possession of the premises in dispute, it appears that the Southern Pacific Company is in such possession, [33] and that an action to quiet title will not lie

unless the plaintiff is in possession or the defendants are out of possession; and as to the defendant Southern Pacific Company, (1) that, upon the facts alleged, an action to quiet title will not lie because that defendant is in possession; (2) that, being in possession as a public service corporation, the only remedy is for damages for the value of the property at the time it was taken; and (3) that the bill fails to disclose that plaintiff is the party entitled to maintain the latter form of action.

It may be remarked preliminarily that, while permissible under the statute of the State, it is not readily to be perceived from the face of the pleading why the two defendants are united in the same action. It will be at once observed that, upon the facts alleged, the case made against one is essentially different in its legal aspects from that against the other in that, while it is alleged that the defendant Southern Pacific Company is in possession of the premises in dispute, using them for its purposes as a public service corporation, it is alleged that the Central Pacific Railway Company is not in possession, and there is nothing in the bill tending to disclose any privity in estate right or claim as between the latter and its codefendant. It is true that, at the argument, the fact was adverted to and not controverted that the Southern Pacific Company is holding and operating the railroad tracks and structures occupying the premises, as the lessee of its codefendant; and if this fact were alleged the joining of the two would obviously be logical and proper, since the possession of the lessee would be that of the lessor. But the fact

is not alleged, and as it is not one of a character, however [34] notorious, of which the Court may take judicial cognizance, its existence cannot aid us in solving present questions, which must be determined from a consideration alone of the facts stated in the bill.

The motion must accordingly be disposed of upon the assumption that there is no such privity or community of interest between the two defendants.

So far, then, as the case made against the Central Pacific Railway Company is concerned, it may be somewhat briefly disposed of. While it is conceded by plaintiff that, being out of possession, the facts would not, under the general doctrine prevailing in the federal courts as to the requisites of a suit to quiet title, authorize it to there maintain an action of that impression, the theory upon which the bill proceeds as to this defendant is that the facts make a case falling within an exception to the general rule given recognition by the Supreme Court in Holland vs. Challen, 110 U. S. 15. That was an action brought in the Federal Court of Nebraska, under a local statute similar to the code provision of this State (C. C. P., sec. 738), authorizing an action in the nature of a suit to quiet title by one holding the legal title to land, whether in or out of possession, to have such title cleared of adverse claims. The bill disclosed that neither the plaintiff nor the defendant was in possession, but that the land was vacant, unoccupied and unimproved. Against the objection that the action could not be maintained, the Supreme Court held that it could, declaring in substance that,

while the State statute enlarged the right ordinarily existing in the Federal Courts to maintain such a suit, there was nothing in the facts to take the case out of the domain of equity as there [35] administered; that in an instance such as that presented by the bill, where both parties were out of possession, and the land vacant and unoccupied, no relief could be had at law, and as the settlement of such controversies and the improvement of the property resulting therefrom was desirable as conductive to the best interests of the state, there was no good reason why the federal courts should not entertain the suit and enforce the right given.

But the doctrine applied was confined strictly to instances where, as there, the premises involved were not held in possession adverse to the plaintiff, but were vacant and unoccupied, and where consequently the remedy afforded by the State statute would not trench upon the fundamental distinction controlling these courts as between actions at law and suits in equity; it being made plain that in any case where the law will afford a plain, adequate and complete remedy, equity will not, indeed, may not, take jurisdiction. Thus, the Court say:

> "No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity.

"It does not follow that by allowing in the federal courts a suit for relief under the statute of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no controversy at law respecting the title to or right of possession of real property when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking."

And this limitation of the effect of that case is definitely stated by the distinguished author of the opinion, in explaining [36] what is there held, in the later case of Whitehead vs. Shattuck, 138 U. S. 146, 155, where, after an extended comment upon the character of the former case and the principles there announced, he says:

"All that was thus said was applied simply to the case presented where neither party was in possession of the property. No word was expressed, intimating that suits of the kind could be maintained in the courts of the United States where the plaintiff had a plain, adequate and complete remedy at law; and such inference was specially guarded against."

A like construction is given the case by Mr. Justice

McKenna, then Circuit Judge, in Southern Pacific Co. vs. Goodrich, 57 Fed. 879, where, commenting upon Holland vs. Challen and Whitehead vs. Shattuck, he concludes:

> "These cases, therefore, must be held to establish that to sustain a suit in equity to quiet title in the federal courts, when the plaintiff is out of possession, the defendant must also be out of possession; in other words, the land must be unoccupied land."

It is quite apparent that that case can have no application to one like the present, where the disputed premises are not only held in adverse possession, but are fully occupied and improved; and that too, as we shall presently see, for a purpose which precludes such possession being disturbed.

As to the case of the defendant Southern Pacific Company. Ordinarily, where a defendant has taken possession of real property and is holding adversely to the owner of the legal title, the remedy of the latter is at law, in ejectment, for the possession and damages for the detention; and this constitutes a complete and adequate remedy. (Whitehead vs. Shattuck, *supra.*) But where the party in possession is holding and using the property in the character and for the purposes of a public utility—a servant of the public—and has established thereon and is operating instrumentalities to that end, then the remedy in ejectment will not lie, by reason of the interest of the public in having its service [37] uninterrupted. In such a case, if the owner has permitted his land to be taken possession of and devoted

to the purposes of a public service without first securing compensation, public policy demands that he be not permitted to oust the holder and retake his land, but that he be relegated to his remedy for the damages suffered through the invasion of his property. (Roberts vs. R. R. Co., 158 U. S. 10; Guernsey vs. No. Cal. Power Co., 160 Cal. 699; 2 Wood on Railroads, 994; Elliot on Railroads (2d ed.), sec. 1000.)

Plainiff recognizes the correctness of these principles in their general application, but his contention is that they do not control in a case where the circumstances are such as that the remedy at law is not full and complete, and this he conceives to be such a case. This is based upon the averment in the bill that the land taken and occupied by this defendant is more than its necessities as a public utility and the service of the public demand; and the contention is that plaintiff may invoke the aid of equity to inquire into the extent to which the land is being necessarily used for that purpose and restore to it such portions of the disputed premises as are not justly required therefor; that until such determination is had, there is no adequate basis upon which to fix the damages for the land necessarily employed in the service of the public; and that to require plaintiff to resort to an action for damages without such determination would compel the concession that all the land taken and occupied by the defendant is essential for its purposes as such utility. [38]

But this contention involves a misapprehension of the nature of the inquiry tendered by this feature of the bill. A little consideration will show, I think,

that the subject presents no real or substantial element of equitable cognizance. This will be perceived more readily by a comparison of the question here presented with that involved in the case of Stuart vs. U. P. R. R. Co., 178 Fed. 756, upon which plaintiff relies as presenting a controlling analogy. The bill in that case sought to quiet the plaintiff's title to a tract of one hundred and sixty acres of land patented to it by the Government, across which extended the right of way of the defendant railroad. Except as occupied by the defendant for the purposes of its right of way, the land was not in possession of either party. Plaintiff's bill asserted title to the entire tract, while the answer, not disclaiming as to the larger parcel, set up specifically title in defendant to a strip four hundred feet wide over the entire tract as a right of way claimed to have been granted it and its predecessor under the "Pacific Railroad Acts," so called; but the evidence, while disclosing a pronounced dispute as to the extent of the actual occupancy and use of the defendant, showed that it was confined to a width of one hundred feet,—fifty feet on either side of its track, which was fenced and improved and in the actual possession of defendant at the commencement of the action.

The lower Court dismissed the bill on the ground that plaintiff's remedy under the facts was at law for damages and not in equity. The Supreme Court reversed this ruling and in giving its reasons, said:

> "It is true, generally speaking, that in the courts of the United States, a suit to quiet title

cannot be maintained by a complainant who is not in possession against a defendant who is in possession; and this is so because there is a plain, complete and adequate remedy at law (citations). But it also is true that in **[39]** exceptional cases where there is no such remedy at law, the general rule does not apply. In our opinion, this is such a case. What really is the subject of the adverse claims of the parties is a strip four hundred feet in width along the appellee's railroad. Part of this is in the actual possession of the appellee, is occupied by permanent and costly railroad structures and is being used as a right of way for strictly railroad purposes. . . . In addition, there is a pronounced and *bona fide* dispute as to how much of the tract has been occupied and used as a right of way; the appellants insisting that this occupancy and use have been confined to twenty-five feet or less on either side of the central line of the railroad, and the appellee insisting that they have extended to fifty feet or more on either side. In these circumstances, it is apparent, as we think, that the appellants are entitled to a hearing and decision as to what extent the appellee is entitled to occupy and use the tract as a right of way; that they are not entitled to oust the appellee from its actual possession or to interrupt the operation of its railroad, and that their rights can be completely and adequately determined by a suit in equity in the nature of one to quiet title, but not otherwise.

> . . . There may be cases in which an action for compensation or damages under the statute would afford a plain, complete and adequate remedy; but this is not such a case, for in the absence of a prior determination of the dispute respecting the width of the strip actually occupied and used as a right of way, such an action could not be maintained without either conceding the greater occupancy and use asserted by the appellee, or risking a recovery of less than the actual damages. A remedy cannot be regarded as plain, complete and adequate when to pursue it is to jeopardize a part of what is claimed, irrespective of the merits."

It will thus be seen that the sole ground upon which the case was held a proper one for equity was because of the dispute and uncertainty over the extent of the actual possession of the defendant and the limits of its right of way under the Congressional grant,—entirely proper subjects for equitable consideration, since, defendant not being in possession of the entire premises, until the extent of its possession was ascertained ejectment would not lie, and until the determination of the limits of its right of way, an action for damages would, for the reasons stated, have been inadequate as a remedy.

It will be readily perceived, however, that the present bill involves no such question as there considered. There is **[40]** no controversy here over the extent of the defendant's actual possession of the premises in dispute; that is alleged in the bill to extend to the entire parcel. What plaintiff claims, and

all that he claims, is that, although defendant is occupying and using the entire premises for its purposes as a common carrier, such occupancy and use are in excess to some extent not alleged of the actual necessities for railroad purposes; and he asks that a court of equity proceed to inquire and determine to what extent if any his property has thus been unnecessarily appropriated to a public use; in other words, to investigate and adjudicate as to how far the disputed premises are actually essential to the necessities of the defendant as a public service corporation in carrying on its railroad business with all its "necessary grounds for stations, buildings, workshops, and depots, machine-shops, switches, turntables, and water stations"; for these are all recognized as proper and necessary adjuncts to the business. (Stuart vs. Union Pac. R. Co., supra, 758.) Such an inquiry, if available to plaintiff in any form (Roberts vs. U. P. R. Co., *supra,* 12), is not and never was a subject of equitable cognizance. Plaintiff's rights as against this defendant are not in any respect different in kind, whatever the difference in form of remedy, than if defendant were seeking to take the property in the first instance for the use to which it is now being put. In such an action plaintiff would be entitled, under proper measure, to the damages he would suffer from the taking. Such an action would be in form one in eminent domain to condemn the property. That action has never been one of equitable cognizance, but is purely one at law. (Kohl vs. United States, 91 U. S. 367, 376.) As [41] there said:

"The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court."

The same is true under the statute of this State; the action is at law and the parties have a right to have the damages assessed by a jury. The Court in such a case must determine whether the use to which it is sought to subject the property is one authorized by law and that the taking is necessary to such use (C. C. P., sec. 1241); which essentially includes the right to determine to what extent the proposed taking is necessary,—the precise question which plaintiff presents by the present bill. The bill merely shows that plaintiff has permitted his property to be taken without first requiring compensation. A public use having intervened for which his property is occupied, he cannot retake it, but must have recourse to his action for damages. Such an action is in legal effect the counterpart or complement of the action to condemn. It proceeds upon

the theory of an implied contract by defendant to pay for the land taken, or for damages for its taking, but in either form it is in its essential nature an action at law, pure and simple; and with complete jurisdiction in the court to determine the question of necessary extent of use,—if, as suggested, that question is now open to plaintiff's challenge.

This conclusion would send the case as to this defendant to the law side of the court but for one obstacle. There is no averment in the bill as to the date of defendant's taking **[42]** of the land, nor as to who was the owner of the legal title at the time of such taking. It is settled that the right of action for damages in such an instance is in the party holding the title at the time of the original wrongful entry. (Roberts vs. No. Pac. R. R., *supra;* Stone vs. Waukegan, 205 Fed. 495; Kindred vs. U. P. R. R. Co., 225 U. S. 582.)

There is, therefore, a failure to state any cause of action in favor of the present plaintiff. This being so, in view of what has been said, the bill must be dismissed as to both defendants. A like order will be entered in each of the cases the numbers of which are above given.

[Filed Dec. 1, 1915.] **[43]**

At a stated term, to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Wednesday, the 1st day of December, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Order Granting Defendants' Motion to Dismiss.)

Defendants' motion to dismiss the amended bill, heretofore heard and submitted, being now fully considered, and the Court having filed its opinion thereon, it was ordered that said motion be and the same is hereby granted. **[44]**

Order Taking Amended Bill and Amendment to the Amended Bill Pro Confesso.

In this cause the defendants and each of them having answered, and thereafter the complainant having filed an amended bill and an amendment of and to the bill, and the defendants and each of them having failed to file herein a new or supplemental answer within the time allowed by Rule 32 of Rules of Practice for the Courts of Equity, and the time for filing a new or supplemental answer herein as allowed by said rules having expired.

Now, upon application of Burrell G. White, Esq., attorney for complainant, it is hereby ordered that the bill of complaint as amended herein be and the

same is hereby taken *pro confesso* against said defendants and each of them.

Entered December 15, 1915.

WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. **[45]**

(Notice of Motion to Set Aside Order Taking Amended Bill Pro Confesso.)

To the Complainant Above Named, and Burrell G. White, Its Attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the defendants above named will, on Monday, the 20th day of December, 1915, at ten o'clock A. M., or as soon thereafter as counsel can be heard in the courtroom of said court, in the new Courthouse and Postoffice Building at Seventh and Mission Streets, San Francisco, California, move said court to set aside, vacate and rescind the order entered herein by the clerk upon the application of complainant on December 15th, 1915, taking the amended bill *pro confesso* against said defendants;

Said motion will be made upon the pleadings, records and files in this case, and upon the ground that said cause of action had already been dismissed by the Court at the time such application by complainant was made, and upon the further ground that said defendants have never been in default therein.

Dated December 16th, 1915.

DEVLIN & DEVLIN,
E. J. FOULDS,
Attorneys for Defendants.

Service of the within Notice is admitted this 17th day of December, 1915.

BURRELL G. WHITE,
Attorney for Complainant.

[Filed Dec. 17, 1915.] [46]

At a stated term, to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 20th day of December, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Order Granting Motion to Vacate and Rescind Order Taking Amended Bill Pro Confesso, etc.)

Defendants' motion to vacate and rescind the order heretofore made by the clerk on the 15th day of December, 1915, taking the amended bill herein *pro confesso* having been argued and fully considered, and it appearing that said order was inadvertently and inadvisedly made, it is hereby ordered that the said motion be and it is hereby granted.

Upon application of defendants, it is hereby or-

dered that a formal decree dismissing said cause be made and entered herein.

It is further ordered that complainants motion to consolidate this case, with the 15 similar cases numbers 89, 90, 91, 92, 93, 94, 95, 101, 102, 103, 126, 127, 128, 129 and 130 for the purposes of appeal be and the same is hereby granted for said purpose defendants exception to this order being noted and allowed. [47]

(Notice of Motion to Consolidate.)

To the Defendants Named in the Above-entitled Suit, and to E. J. Foulds and Devlin & Devlin, Attorneys for said Defendants:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the complainant in the above-entitled suit will on Monday, the 20th day of December, 1915, at ten o'clock A. M. or as soon thereafter as counsel can be heard in the courtroom of the above-named court in the new courthouse and Postoffice building at Seventh and Mission Streets, San Francisco, California, move said Court to consolidate the above-entitled suit and similar suits in equity, numbers 89, 90, 91, 92, 93, 94, 95, 101, 102, 103, 126, 127, 128, 129, and 130 for the purpose of all further proceedings herein and in said other fifteen similar suits;

Said motion will be made upon the pleadings, records and files in this suit and said other suits, and upon the ground that the consolidation of said suits is in the interest of the convenient administration of justice and disposition of said suits.

Dated December 18th, 1915.

BURRELL G. WHITE,

Attorney for Complainant in each and all of said Suits.

Service of the within Notice of Motion to Consolidate is admitted this 18th day of December, 1915, and all objection to time of service of said Notice of Motion is hereby waived.

DEVLIN & DEVLIN and
E. J. FOULDS,
Attorneys for Defendants.

[Filed December 20, 1915.] [48]

At a stated term, to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 20th day of December, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 88—IN EQUITY.

ENNIS-BROWN COMPANY, a Corporation,
Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,
Defendants.

Decree.

The Court having heretofore, on the 1st day of December, 1915, on defendants' motion, made its order dismissing the amended bill in the above-entitled cause as not stating a cause of action, but allowing the complainant ten days after the date of said order in which to amend, if so advised, and notice of said order having been duly given, and the said complainant having declined to amend its said amended bill within said time or at all;

Now, on motion of the defendants, it is ordered and adjudged that the above and foregoing cause be, and the same is, hereby dismissed, and that the said defendants do have and recover their costs of suit against the said complainant, taxed at the sum of $18.80.

WM. C. VAN FLEET,
Judge.

[Filed and entered December 22, 1915.] [49]

Notice of Motion for Further and Better Particulars.

To the defendants Central Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, and E. J. Foulds, William H. Devlin, Robert T. Devlin and Devlin and Devlin, Attorneys for Defendants.

YOU AND EACH OF YOU WILL PLEASE HEREBY TAKE NOTICE that complainant above named will, on Monday, the 16th day of November, 1914, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, in the courtroom, of Department 2,

of the above-entitled court, in the new courthouse and Postoffice building, Seventh and Mission Streets, San Francisco, California, move the said Court for an order directing the defendants to file herein further and better particulars of the entry of the Central Pacific Railroad Company of California, a corporation, upon the real property and lands described in the complaint filed herein, alleged in said answer on page 6, 2d paragraph thereof, to have been made by said Central Pacific Railroad Company of California in the year 1863; under what claim of right said entry was made; under what instrument or instruments, if any, said entry was made; and under what instrument or instruments, if any, possession of said lands has been held; [50]

To file herein a further and better statement of the nature of their claim to the title of the property described in the complaint, filed herein, made in answer to said complaint; what created the alleged rights of defendants, and upon what instrument of instruments their claims are based.

Said motion will be based upon said answer and all papers on file herein, and upon this notice, and will be made upon the ground that said parts of said answer are uncertain, indefinite and evasive.

Dated November 10th, 1914.

BURRELL G. WHITE,
Attorney for Complainant.

Due service and receipt of copy of the within No-

tice this 10th day of November, 1914, are hereby admitted.

E. J. FOULDS,
DEVLIN & DEVLIN,
Attorneys for Defendants.

[Filed November 11, 1914.] [51]

At a stated term, to wit, the November term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wednesday, the 23d day of December, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

(Order Denying Complainant's Motion for Further and Better Particulars.)

Plaintiff's motion for further and better particulars in answer, heretofore heard and submitted, being now fully considered and the Court having filed its opinion thereon, it was ordered that said motion be and the same is hereby denied. [52]

Memorandum of Points and Authorities upon Plaintiff's Motion for Further and Better Particulars.

Plaintiff relies upon the points and authorities submitted in similar cases pending herein, and for the purpose of presentng the same to the Court attaches, and makes a part hereof, a copy of such points and

authorities as were filed in re. John Breuner Company against Central Pacific Railway Company, et al., Equity Suit No. 130.

Plaintiff and the several plaintiffs in the similar suits pending herein against the same defendants, hereby offer to file herein such further particulars as the defendants may demand as to the basis of their several causes of action, against the defendants, filed herein.

Respectfully submitted,
BURRELL G. WHITE,
Attorney for Complainant.

Filed March 1, 1915.] [53]

(Petition for Allowance of Appeal.)

Now comes Ennis-Brown Company a corporation, complainant above-named, and conceiving itself aggrieved by the order and decree of the above-entitle court made and entered by said court in the above-entitled suit on the 20th day of December, 1915, wherein and whereby it was ordered and adjudged that said suit be dismissed, and whereby said suit was dismissed; it hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors filed herein and herewith, and petitions of said Court to allow said complainant to prosecute an appeal to said United States Circuit Court of Appeals, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of bond

which said complainant shall give and furnish upon said appeal, and that a transcript of the record, including the papers and proceedings upon which said order and decree were made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

Dated December 23d, 1915.

BURRELL G. WHITE,

Solicitor for Appellant and Complainant. [54]

Receipt of a copy of the within Petition for Allowance of Appeal is hereby admitted this 23d day of December, 1915.

DEVLIN & DEVLIN,
E. J. FOULDS.

[Filed December 23, 1915.] [55]

(Assignment of Errors on Appeal.)

Now comes Ennis-Brown Company, a corporation, complainant in the above-entitled suit, and by its solicitor says that in the record, the proceedings and decree made and entered in this suit on the 20th day of December, 1915, wherein and whereby it was ordered and adjudged that said suit be dismissed, and whereby said suit was dismissed, there is manifest error in that the said complainant has been denied its just rights by the above-named District Court, and the said complainant hereby assigns and sets out separately and particularly the following errors, viz:

I.

The said Court erred, in granting defendants' motion to dismiss the amended bill of complaint herein on December 1st, 1915, by holding and deciding that

said amended bill did not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court.

II.

The said Court erred, in granting said motion, by holding and deciding that the defendant Central Pacific Railway Company [56] was not properly joined as a defendant herein with the defendant Southern Pacific Company.

III.

The said Court erred in granting said motion by holding and deciding that complainant, while out of possession, could not maintain herein its suit to quiet its title against the defendant Central Pacific Railway Company, while out of possession and while the land involved was occupied.

IV.

The said Court erred in granting said motion by holding and deciding that said amended bill of complaint did not state facts sufficient to entitle complainant to maintain its suit herein to quiet title against defendant Southern Pacific Company while in possession.

V.

The said Court erred in granting said motion by holding and deciding that the amended bill of complaint showed that complainant had a plain, complete and adequate remedy in the action at law in damages.

VI.

The said Court erred in ordering and adjudging the dismissal of said suit on the 20th day of December, 1915, in that said amended bill of complaint stated

and does state facts sufficient to constitute a valid cause of action against said defendants of cognizance in equity in this court.

VII.

The said Court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court. [57]

VIII.

The said Court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court agaist the defedant Central Pacific Railway Company.

IX.

The said Court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court against defendant Southern Pacific Company.

X.

The said Court erred in making said decree dismissing said suit in that it is not stated in said decree that the dismissal of said suit is without prejudice to an action at law.

XI.

The said Court erred in not ordering said suit transferred to the law side of said court if said amended bill did not and does not state a cause of ac-

tion of cognizance in equity in this court.

XII.

The said Court erred in granting motion to transfer to the law side of the court on May 28th, 1915, unless complainant should file an amended bill, by holding and deciding that the bill aided by the answer then on file did not state facts sufficient to constitute a cause of action in equity to quiet title, cognizable in this court.

XIII.

The said Court erred in holding and deciding on the 28th day of May, 1915, that the bill of complaint aided by the [58] answer then on file did not contain facts sufficient to constitute a cause of action cognizant in equity in this court against the defendants or either of them.

XIV.

The said Court erred in holding and deciding on the 28th day of May, 1915, that the answer then on file did not state facts sufficient to constitute a cause of action to quiet title against complainant in equity in his court.

XV.

The said Court erred in holding and deciding on the 28th day of May, 1915, that the answer then on file did not state facts sufficient to constitute a valid cause of action in equity against complainant by defendants.

XVI.

The said Court erred in denying the complainant's motion for a statement of further and better particulars as to the matters set out in complainant's

notice of motion for such statement, contained in the transcript of record of this suit on appeal.

XVII.

The said Court erred in holding and deciding that defendants had not on May 28th, 1915, submitted to the jurisdiction of this Court in equity in this suit and by refusing to hold that said defendants had waived their right, if any they or either of them ever had, to object to the jurisdiction of this court in equity in this suit.

XVIII.

The said Court erred in holding and deciding that the defendants had not on December 1st, 1915, submitted to the jurisdiction of this Court in equity in this suit, and by refusing to hold and decide that said defendants had waived their right, [59] if any they or either of them ever had, to object to the jurisdiction of this Court in equity in this suit.

XIX.

The said Court erred in granting defendants' motion to vacate, set aside and rescind the order for a decree *pro confesso*, in favor of complainant, entered herein on December 15th, 1915, by holding and deciding that said order had been inadvertently and inadvisedly entered.

XX.

The said Court erred in vacating, setting aside and rescinding the order for a decree *pro confesso*, in favor of complainant, entered herein on December 15th, 1915, by holding and deciding that the defendants were not and that neither of them was in default

for failure to file a new or supplemental answer herein.

XXI.

The said Court erred in setting aside, vacating and rescinding said order for a decree *pro confesso,* on December 20th, 1915, by refusing to hold and decide that the defendants were and each of them was in default for failure to answer the amended bill herein.

XXII.

The said Court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute any valid cause of action at all.

WHEREFORE, said complainant, Ennis-Brown Company, a corporation, prays that the order and decree of the above-entitled court, made and entered on said 20th day of December, 1915, and all other orders, in the making of which error is herein assigned, be reversed, and for such other relief, orders [60] and decrees as the complainant is entitled to in equity.

BURRELL G. WHITE,
Solicitor for Complainant.

Receipt of a copy of the within Assignment of Errors on Appeal is hereby admitted this 23d day of December, 1915.

DEVLIN & DEVLIN.
E. J. FOULDS.

[Filed December 23, 1915.] [61]

(Order Permitting an Appeal and Fixing Amount of Cost Bond on Appeal.)

WHEREAS, in the District Court of the United States, Ninth Circuit, Northern District of California, on the 20th day of December, 1915, a decree was made and entered in the above-entitled cause, wherein and whereby it was ordered and adjudged that the above-entitled suit be dismissed, and wherein and whereby said suit was dismissed; and

WHEREAS, Ennis-Brown Company, a corporation, complainant in said cause has on this 23d day of December, 1915, filed its petition for the allowance of an appeal from said order to the United States Circuit Court of Appeals, Ninth Circuit, together with an asignment of errors, in and by which said petition it has prayed that an order be made fixing the amount of the cost bond which it shall give and furnish on said appeal:

Now, therefore, in consideration of the premises, and good cause appearing therefor, it is ORDERED that said appeal be, and the same is hereby permitted and allowed, in which said Ennis-Brown Company, a corporation, are appellants and Central Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are appellees. [62]

It is further ORDERED that the said Ennis-Brown Company, a corporation, complainant herein, shall file its undertaking and cost bond in form and substance conditioned with sureties in accordance with the provisions of the law and the rules and practice of this court in the said United States Dis-

trict Court in the sum of five hundred ($500) dollars, which said bond and sureties thereon shall be approved by a Judge of this court before filed, and said amount is hereby fixed as the amount of said bond.

Dated December 23d, 1915.

WM. C. VAN FLEET,
Judge of United States District Court.

[Filed December 23, 1915.] [63]

(Bond on Appeal.)

KNOW ALL MEN BY THESE PRESENT: That we, Ennis-Brown Company, a corporation, as principal, and Dwight H. Miller and Scott F. Ennis as sureties, are held and firmly bound unto the Central Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, in the full amount of Five Hundred ($500) Dollars to be paid to the said Central Pacific Railway Company and Southern Pacific Company, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, successors, representatives and assigns firmly by these presents.

Sealed with our seals, and dated this 24th day of December, 1915.

WHEREAS, the above-named complainant, Ennis-Brown Company, a corporation, has obtained from the District Court of the United States, Northern District of California, its order allowing said complainant to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, to

reverse an order and decree made and entered in the above-entitled suit, wherein and whereby it was ordered and adjudged that said suit be [64] dismissed; and wherein and whereby said suit was dismissed;

Now, therefore, the condition of this obligation is such that if the above-named complainant, Ennis-Brown Company, a corporation, shall prosecute such appeal to effect, and answer all costs if it shall fail to make good said plea, then this obligation shall be void; otherwise, to remain in full force and effect.

IN WITNESS WHEREOF, said Ennis-Brown Company, a corporation, has caused these presents to be executed by its secretary thereunto duly authorized, and its corporate seal to be hereunto affixed, and said sureties have hereunto subscribed their names this 24th day of December, 1915.

ENNIS-BROWN CO.
By SCOTT F. ENNIS,
Secretary.
DWIGHT H. MILLER.
SCOTT F. ENNIS.

State of California,
County of Sacramento,—ss.

Dwight H. Miller and Scott F. Ennis, being sworn, each for himself, says that he is one of the sureties named in the above undertaking; that he is a resident and freeholder within the State of California and that he is worth the sum in the said undertaking specified over and above all his just debts and liabili-

ties exclusive of property exempt from execution.

DWIGHT H. MILLER.
SCOTT F. ENNIS.

Subscribed and sworn to before me this 24th day of December, 1915.

[Seal] CLINTON E. HARBER,
Notary Public in and for the County of Sacramento, State of California. [65]

State of California,
County of Sacramento,—ss.

On this twenty-fourth day of December, 1915, before me, Clinton E. Harber, a Notary Public in and for said county of Sacramento, duly commissioned and sworn, personally appeared Scott F. Ennis, known to me to be the secretary of the corporation that executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at my office in the county of Sacramento, the day and year in this certificate first above written.

[Seal] CLINTON E. HARBER,
Notary Public in and for said Sacramento County, State of California.

State of California,
County of Sacramento,—ss.

On this twenty-fourth day of December, in the year one thousand nine hundred and fifteen, before me, Clinton E. Harber, a notary public in and for the county of Sacramento, duly commissioned and

sworn, personally appeared Dwight H. Miller and Scott F. Ennis known to me to be the persons whose names are subscribed to the within instrument, and they duly acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] CLINTON E. HARBER,
Notary Public in and for the County of Sacramento, State of California.

The foregoing bond and the sureties mentioned therein are hereby approved this 27th day of December, 1915.

WM. C. VAN FLEET,
Judge.

[Filed December 27, 1915.] [66]

(Complainant's Praecipe for Transcript of Record on Appeal.)

To the Clerk of the Above-entitled Court:

You will please issue and prepare a transcript of record on appeal, by complainant in the above-entitled suit, to be filed in the office of the clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under an appeal perfected to said court in said suit, and include in said transcript copy of the following pleadings, papers, records and proceedings, to wit:

(1) Bill of complaint.
(2) Answer of defendants.
(3) Amended bill of complaint.

(4) Amendment to and of the amended bill.

(5) Stipulation and order extending time to answer, filed August 10th, 1914.

(6) Stipulation and order extending time to answer, filed August 31st, 1914.

(7) Minute order setting suit for trial made and entered March 1st, 1915. [67]

(8) Paragraph III of memorandum of points and authorities filed herein on 30th day of October, 1914, in consolidated suit No. 101 on behalf of defendants.

(9) Defendants' notice of motion to transfer from the equity side to the law side of the above-entitled court, filed May 20th, 1915.

(10) Order made May 28th, 1915, granting defendants' motion to transfer to law side of the court.

(11) Defendants' notice of motion to dismiss.

(12) Opinion of Court on defendants' motion to dismiss.

(13) Order dated December 1st, 1915, granting defendants' motion to dismiss.

(14) Order for a decree *pro confesso* entered December 15th, 1915.

(15) Notice of motion to vacate, set aside and rescind order for a decree *pro confesso.*

(16) Order granting motion to vacate, set aside and rescind order for a decree *pro confesso.*

(17) Motion to consolidate suits made December 20th, 1915.

(18) Order made December 20th, 1915, consolidating suits.

(19) Order and decree made and entered Decem-

ber 20th, 1915, granting defendants' motion to dismiss, and dismissing suit.

(20) Complainant's notice of motion for further and better particulars.

(21) Order of December 23d, 1914, denying complainant's motion for further and better particulars.

(22) Complainant's offer to file such particulars as to its claim of ownership of defendants might demand, filed March 1st, 1915, in companion suit No. 102.

(23) Petition for order allowing appeal.

(24) Assignment of errors. [68]

(25) Order allowing appeal and fixing bond.

(26) Bond on appeal.

(27) Complainant's praecipe for transcript of record.

(28) Citation on appeal.

(29) That portion of affidavit of Burrell G. White filed in consolidated suit No. 101 on November 18th, 1915, beginning with line 30, page 1, and ending with line 12, page 4 thereof, showing endorsements on back thereof; and all other papers which complainant shall file herein in prosecution of or upon its said appeal.

Dated December 23d, 1915.

BURRELL G. WHITE,
Solicitor for Complainant.

Receipt of a copy of the within complainant's praecipe for transcript of record on appeal is hereby admitted this 23d day of December, 1915.

DEVLIN & DEVLIN.
E. J. FOULDS.

[Filed December 23, 1915.] [69]

(Order Denying Motion to Strike Out Parts of Answer and Granting Motion for Further and Better Particulars of Answer.)

BURRELL, G. WHITE, Esq., Attorney for Complainant.

DEVLIN & DEVLIN and E. J. FOULDS, Attorneys for Defendants.

The motion to strike out parts of answer herein is denied.

The motion for further and better particulars as to the twelfth defense set up in defendants' answer is granted, and defendants are directed to file herein such further and better particulars regarding the nature of their entry upon the land in question, under what claim or right, if any, such entry was made; under what instrument or instruments in writing, if any, such entry was made, and under what instrument or instruments, if any, possession of said lands has been held.

October 30th, 1914.

M. T. DOOLING,
Judge.

[Filed October 30, 1914.] **[75]**

Stipulation (and Order Extending Time to File Amended Answer).

IT IS HEREBY STIPULATED that the above-named defendants may have to and including the 25th day of November, 1914, in which to amend their answer, or to file an amended answer, required by

the order of the Court made on October 30th, 1914.

DATED November 4th, 1914.

BURRELL G. WHITE,
Attorney and Solicitor for Complainant.

SO ORDERED this 10th day of November, 1914.

WM. C. VAN FLEET,
Judge.

[Filed November 10, 1914.] **[76]**

(Opinion and Order Denying Motion for Further and Better Particulars in Answer.)

BURRELL G. WHITE, Esq., Attorney for Complainant.

DEVLIN & DEVLIN, Attorneys for Defendants.

While I held in the case of Curtis vs. Central Pacific Railway Company, et al. (Equity 101), that plaintiff's motion for further and better particulars as to the twelfth defense set up in the answer should be granted, upon further argument and consideration I am convinced that defendants are entitled to rest upon the defense as therein set forth. The reason, though not expressed, upon which the order in Case 101 was based was, that notwithstanding anything set out in this defense the entry and possession therein relied upon may have been under lease or agreement with plaintiff or his predecessors in interest. But even if this be true it is within the knowledge of plaintiff, and does not render the defense as such less a defense *pro tanto* to the action to quiet title. Possession is alleged therein, and it is con-

ceded that if such possession is established plaintiff must fail. The motion for further and better particulars is therefore denied.

M. T. DOOLING,
Judge.

December 23d, 1914.

[Filed December 23, 1914.] [88].

Notice of Motion for Further and Better Particulars.

To the Defendants Central Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, and E. J. Foulds, William H. Devlin, Robert T. Devlin and Devlin and Devlin, Attorneys for Defendants:

YOU AND EACH OF YOU WILL PLEASE HEREBY TAKE NOTICE that complainant above named will, on Monday, the 1st day of February, 1915, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, in the courtroom, of Division 2, of the above-entitled court, in the new Courthouse and Postoffice Building, Seventh and Mission Streets, San Francisco, California, move the said court for an order directing the defendants to file herein further and better particulars of the entry of the Central Pacific Railroad Company of California, a corporation, upon the real property and lands described in the complaint filed herein, alleged in their amended answer on page 6, paragraph I thereof, to have been made by said Central Pacific Railroad Company of California in the year 1863, under what claim of right said entry was made;

under what instrument or instruments, if any, said entry was made, and under what instrument or instruments, if any, possession of said lands has been held; to file herein a further and better statement of **[91]** the nature of their claim to the title of the property described in the complaint filed herein made in answer to said complaint; what created the alleged rights of defendants; by what instrument or instruments, if any, said Central Pacific Railway Company has acquired title to said real property alleged in said amended answer, on page 3, lines 9 to 13 inclusive, to have been acquired by said Central Pacific Railway Company, and upon what instrument or instruments, if any, said claims are based.

Said motion will be based upon said answer and all papers on file herein, and upon this notice, and will be made upon the ground that said parts of said answer are uncertain, indefinite and evasive.

Dated January 26th, 1915.

BURRELL G. WHITE,
Attorney for Complainant.

Due service and receipt of copy of the within Notice is hereby admitted this 26th day of January, 1915.

E. J. FOULDS,
DEVLIN & DEVLIN,
Attorneys for Defendants.

[Filed January 26, 1915.] **[92]**

At a stated term, to wit, the November term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 15th day of February, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

[Order Denying Motion for Further and Better Particulars, etc., and Granting Motion to Amend Twelfth Defense in First Amended Answer.]

Plaintiff's motion for further and better particulars as to the twelfth defense set up in defendants' amended answer, heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion thereon; it was ordered that said motion be and the same is hereby denied. Defendants' motion for leave to amend the twelfth defense in the first amended answer, heretofore heard and submitted, being now fully considered, and the Court having rendered its oral opinion thereon; it was ordered that said motion to amend be and the same is hereby granted. **[96]**

Notice of Motion to Transfer Action to Law Side of Court.

To the Above-named Complainant, and His Attorney:

YOU, AND EACH OF YOU, WILL PLEASE

TAKE NOTICE, that on Monday, the 21st day of June, 1915, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the court-room of the above-entitled court, in the United States Postoffice Building at Seventh and Mission Streets, in the city and county of San Francisco, State of California, the said defendants, jointly and severally, will move the said court for an order transferring the above-entitled action to the law side of the court.

Said motion will be made upon the following grounds:

I.

That it appears that the said complainant has a full, adequate and complete remedy at law.

II.

That it appears from the said complaint that the defendant Southern Pacific Company is in possession, and that it has no title thereto, and the plaintiff is the owner in fee thereof, and that an action in ejectment upon the law side of the Court is the proper [108] remedy, and if, on the other hand, ejectment will not lie, then an action for damages for the value of the land at the time of the taking of the possession thereof by Southern Pacific Company is the proper remedy, and such remedy is enforceable at law and not in equity.

III.

Because the amended complaint does not show jurisdiction in equity.

IV.

Because the amended complaint does not obviate

the objections heretofore urged to the jurisdiction and, therefore, the order of Court heretofore made, transferring the suit to the law side of the court, should remain in operative force.

Upon the hearing of said motion, said defendants will rely upon the amended complaint and upon the records of said cause and the papers on file.

Dated June 12th, 1915.

E. J. FOULDS,
ROBT. T. DEVLIN, and
WM. H. DEVLIN,
DEVLIN & DEVLIN,
Attorneys for Defendants.

[Filed June 15, 1915.] **[109]**

Notice of Motion for a Better Statement and for Further and Better Particulars.

To the Above-named Complainant, and His Attorney:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that on Monday, the 21st day of June, 1915, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, in the United States Postoffice Building at Seventh and Mission Streets, in the city and county of San Francisco, State of California, the said defendants, jointly and severally, will move the said Court for an order requiring the said plaintiff to furnish to defendants, jointly and severally, a further and better statement of the nature of the claim, and also further and better

particulars, upon the following matters stated in the amended complaint:

I.

Whether or not it is claimed that the defendant Southern Pacific Company is rightfully in possession of the property.

II.

Whether the remedy against the defendant Southern Pacific Company is for damages. **[110]**

III.

Whether the plaintiff was the owner in fee of the property described at the time the defendant Southern Pacific Company took possession.

IV.

What connection, if any, there is between the Central Pacific Railway Company out of possession and the Southern Pacific Company in possession.

V.

How the two causes of action set forth in the amended bill can be joined in one complaint, to wit, a cause of action to quiet title against the defendant Central Pacific Railway Company out of possession and against the defendant Southern Pacific Company in possession.

VI.

Why the plaintiff has not a full, complete and adequate remedy at law, namely; an action in ejectment on the law side against the defendant Southern Pacific Company.

Upon the hearing of said motion, said defendants will rely upon the amended complaint and upon the records of said cause and the papers on file.

Dated June 12, 1915.

E. J. FOULDS,
ROBT. T. DEVLIN and
WM. H. DEVLIN,
DEVLIN & DEVLIN,
Attorneys for Defendants.

[Filed June 15, 1915.] [111]

(Stipulation and Order as to Motions to Transfer Causes.)

It is hereby stipulated and agreed that defendants' motions to transfer said causes to the law side of the court, for further and better particulars, and to dismiss said causes which motions were noticed for and heard by the Court on June 21st, 1915, shall be taken and deemed to be made with reference to, and to apply to, the complaint as amended June 21st, 1915, by the amendments filed on said date; and that an order may be made in conformity herewith.

Dated July 1st, 1915.

BURRELL G. WHITE,
Attorney for Complainants.
DEVLIN & DEVLIN and
E. J. FOULDS,
Attorneys for Defendants.

So ordered this 6th day of July, 1915.

WM. C. VAN FLEET,
Judge.

Entered July 6, 1915, W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [112]

Notice of Motion for Further and Better Particulars as to Paragraph IX Added to Bill of Complaint by Separate Amendment.

To the Above-named Complainant, and His Attorney:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that on Monday, the 12th day of July, 1915, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, in the United States Postoffice building at Seventh and Mission Streets, in the city and county of San Francisco, State of California, the said defendants, jointly and severally, will move the said Court for an order for a better statement and further and better particulars as to the matters set forth in paragraph IX of the amended bill, filed on June 21st, 1915, upon the following grounds:

I.

That is cannot be told whether or not Central Pacific Railway Company maintains any railroad track, or other railroad property, over the land described in the complaint.

II.

That it cannot be told whether Southern Pacific Company and Central Pacific Railway Company are both using the railroad main track. [113]

III.

That it cannot be told how the prevention of the maintenance and operation of said railroad track would interfere with the service of Southern Pacific

Company to the general public, or how such allegation in any way adds to the cause of action of complainant.

IV.

That it cannot be told the width of the right of way for the main line track.

V.

That it cannot be told on what other portions of the property the switching tracks, or the freight sheds, or the wharves, are situated.

VI.

That it cannot be told in what way the public interest does not require the maintenance or continuance of the switching tracks, or the sheds, or the wharves.

VII.

That it cannot be told in what way the allegation in reference to the public interest not requiring the same in any way adds to the cause of action of complainant.

VIII.

That it cannot be told whether or not the complainant claims that all of the property described in the complaint is devoted to public use, or whether some part of the same is devoted to public use, and other parts are not, and, if so, what parts are, and what parts are not, or whether there is necessity therefor, or how this Court can determine the question of necessity, or why the said complainant, if the defendants do not own the property, and they, or either of them, are in possession, has not [114] the right to bring an action in ejectment on the law side of the court.

IX.

That it does not appear how the business streets of the city of Sacramento, named in paragraph IX, in any way affect the situation, or how the complainant has any interest in said streets, or why the foot of said streets and the lands adjacent thereto, is the most convenient point for the shipment of freight into and from the city of Sacramento, and, if so, why the defendant's companies, or either of them, cannot use the same, as well as anybody else, as a convenient point for the shipment of freight into and from the city of Sacramento, or why the commerce of the city of Sacramento in any way affects the action, or how or why the public interest of the citizens of the city of Sacramento, or of the county of Sacramento, or thereabouts, require the said property should not be used exclusively by the said defendant Southern Pacific Company, or how the said complainant can raise this question, or how the use of said property by Southern Pacific Company is subordinate to the requirement of public interest, or that the lands upon which said sheds are built should be open to use by others, and should be subject to the title of the alleged rights of the complainant therein and thereto, or what the said rights are.

X.

That the said complainant should be required to set forth better and further particulars, showing why, if it is not in possession of the property and the defendant Southern Pacific Company is, an action on the law side for ejectment would lie, and if, by reason of the property being devoted to public use, it

is not entitled to ejectment, why an action for damages on the law [115] side, for the taking of said property, is not open to it. It further should be required to set forth when the defendant Southern Pacific Company took possession of the property, and who was the owner of the property at the said time.

Upon the hearing of said motion, said defendants will rely upon the amended complaint and upon the records of said cause and the papers on file.

DATED July 1st, 1915.

E. J. FOULDS,
ROBT. T. DEVLIN and
WM. H. DEVLIN,
DEVLIN & DEVLIN,
Attorneys for Defendants.

Receipt of a copy admitted this 7th day of July, 1915.

BURRELL G. WHITE,
Attorney for Complainant.

[Filed July 7, 1915.] [116]

Affidavit of Wm. H. Devlin.

State of California,
County of Sacramento,—ss.

Wm. H. Devlin, being first duly sworn, deposes and says:

That he is now, and at all the times herein mentioned was, a member of the law firm of Devlin & Devlin, who are now, and during all the times herein mentioned were, duly licensed attorneys at law with

their offices at Sacramento, California, and that he is now, and during all the times herein mentioned was, one of the attorneys for the defendants in the above-entitled proceeding, and, as such, he has charge of the defendants' case, so far as said firm is concerned.

That the above case was commenced on the 27th day of June 1914, and, at the same time, or shortly thereafter, fifteen companion cases were filed, all of which are now pending.

That on July 31st, 1914, deponent sent to Mr. Burrell G. White, [117] attorney for the complainant, a telegram, which was in the words and figures following, to wit:

"Sacramento, Cal., July 31, 1914.

Mr. Burrell G. White,
Attorney at Law,
Nevada Bank Bldg.,
San Francisco, Cal.

Am leaving on my vacation next Tuesday to be gone three weeks. Have decided to answer in all cases in Federal Court. As this will take time I wish you would extend time to answer in all cases to and including the fifteenth of September. Will consent to cases going on next trial calendar if desired by you, or to be tried at next April term at Sacramento. Please grant the continuance, otherwise I shall have no vacation.

WM. H. DEVLIN.

Charge to Acct. of Devlin & Devlin."

—and in reply thereto he received a telegram from Mr. Burrell G. White, a copy of which is as follows:

"San Francisco, Cal., July 31, 1914.

William H. Devlin,
Attorney at Law,
Sacramento.

Your telegram of July 31st received. Your request is granted. If we are to wait so long however I think you should send me a rough synopsis of your defense so that the time of preparation may not be lost to me; also that depositions may possibly not have to be taken.

BURREL G. WHITE."

That the above case and the companion cases referred to were on the trial calendar of the March, 1915, term of the above-entitled court, and were set for trial for the April term at Sacramento, California, the date set therefor being May 25th, 1915. That at the said Sacramento term the defendants moved to have the causes transferred to the law side of the Court, for the reason that the complaint in each case did not show that the action was properly upon the equity side of the Court, and on May 26th, 1915, the Court heard the argument upon this motion and made an order [118] granting the transfer to the law side, but allowed the complainant to file an amended complaint in each case within ten days to show, if he could, that each action was properly on the equity side. Pursuant to the leave so granted, the said complainant, on or about the 4th day of June, 1915, filed an amended complaint, and which was verified the same as the original complaint. That thereafter, within the time allowed by law, the said defendants moved to dismiss the action, based upon

the amended complaint, and also moved to transfer the case to the law side, claiming that the amended complaint stated no facts sufficient to constitute a cause of action, and that it should be dismissed, or if any cause of action were stated it was a legal cause of action and, hence, the action should be upon the law side. Both of these motions were subsequently argued and submitted and are still under submission. That the case is not at issue, as no answer to the amended complaint has ever been filed.

When the July term calendar of 1915 was made up by the clerk, the said causes were not placed upon the trial calendar by the clerk, for the reason that they were not at issue, by reason of the filing of the amended complaint and no answer being filed, and the time to answer has not commenced to run, because the motion to dismiss has not yet been passed upon, and the time to answer under Rule 29 of the New Equity Rules is five days after the order denying motion to dismiss is made, if made. In addition thereto, there was a motion for better and further particulars, which was then pending, and is still pending and under submission.

When the July, 1915, term calendar was called, Mr. Burrell G. White, attorney for the complainant in each case, asked the Court to set the cases for trial, but the Court then refused to do so, holding that the cases were not at issue, by reason of the matters pending [119] and as aforesaid set forth. That there has been no change in the situation since July, 1915.

Affiant is informed and believes and, therefor,

avers that the said cases were improperly upon the November, 1915, term calendar, as the said cases were not at issue, or ready for trial, but, at the request of the said Mr. Burrell G. White, the Court put them upon the November term calendar.

That at the hearing of the April term calendar at Sacramento, California, which was held on May 26th, 1915, it became necessary for the trial of the case to go over, because the Court had transferred it to the law side, conditionally, as aforesaid set forth, and had given the said complainant ten days in which to file an amended complaint.

That affiant has never entered into any stipulation, or agreed in any way, that the above case, or any of the companion cases, should be tried at San Francisco. The telegram sent by affiant to Mr. Burrel G. White, dated July 31st, 1914, above referred to, had reference to the condition of affairs then pending. At that time no motion to dismiss, or any other motion, was pending. When the cases were called on the March, 1915, calendar to be set for trial, both sides agreed that they should be tried at the April, 1915, term at Sacramento. The defendants in each of the cases if the motion to dismiss is denied, will be required to, and will, file an answer to the amended complaint, but the time to do so will not be operative until the motion to dismiss is passed upon.

Affiant has not, nor has his firm, nor has any of the other attorneys for the defendants, ever made any agreement or stipulation whatsoever that the above case, or any of the companion cases, should be tried at San Francisco.

Affiant further avers that it would be more convenient to the [120] Court, to counsel on both sides and to the witnesses, if the case be at issue, to have the case tried at the next April term at Sacramento, California, for these reasons:

(a) That for the defendants' case it will be necessary to call some of the local officials of the Southern Pacific Company, who are busily engaged in the operation of trains, and whose absence from the city will seriously interfere with the discharge of their duties to the public.

(b) That it will be necessary to offer in evidence many official records from the board of supervisors of the county of Sacramento, also from the city of Sacramento, and also various deeds and other recorded instruments from the office of the county recorder of the county of Sacramento.

(c) That as many witnesses residing in the county of Sacramento, State of California, will be or may be called, it would be more convenient for them to have the cases tried at Sacramento, as the entire subject matter and all of the evidence to be adduced by either side is expected, or is, to be obtained in Sacramento.

(d) That it will probably be necessary to offer in evidence many maps from the recorder's office of Sacramento County, and certified copies of the same cannot be had or obtained except at great expense.

That the defendants are not seeking to delay the trial of the above case, but claim that it is not at issue, by reason of the matters above set forth, namely: the pending motion to dismiss and the pend-

ing motion to transfer to the law side and the pending motion for a statement of better and further particulars, and that it could be tried to more convenience to all parties concerned if tried at the hearing of the next April calendar at Sacramento. [121]

Affiant absolutely denies that there ever was any stipulation, agreement or understanding of any kind that the above case, or any of the cases referred to, should be tried in San Francisco, or in fact, in any other place.

WM. H. DEVLIN.

Subscribed and sworn to before me, this 13th day of November, 1915.

[Seal] C. S. WOODWORTH,
Notary Public in and for the County of Sacramento, State of California.

[Filed November 15, 1915.] [122]

Affidavit of Burrell G. White.

State of California,
County of San Francisco,—ss.

Burrell G. White, being first duly sworn, deposes and says:

That he is now and at all the times herein mentioned was, a duly licensed attorney at law, with offices in the Nevada Bank Building, at No. 14 Montgomery St., San Francisco, California, and that he is now, and during all the times herein mentioned was, an attorney for the complainant in the above-entitled suit;

That affiant received the telegram dated July 31, 1914, copy of which is set out in affidavit of Mr. William H. Devlin filed herein.

That affiant caused to be sent to said William H. Devlin the telegram in reply, dated July 31, 1914, copy of which is set out in said affidavit of said William H. Devlin.

That on September 12th, 1914, Messrs. Devlin & Devlin, who are now, and have been at all the times herein mentioned, attorneys of record for defendants herein, caused to be delivered [123] to affiant, a letter in words and figures as follows:

"Subject:

P. C. Drescher vs. Central Pacific Ry. Co., et al., #126.

Heenan Inv. Co. vs. Central Pacific Ry. Co., et al., #127.

F. B. Adams vs. Central Pacific Ry. Co., et al., #128.

A. S. Hopkins Co. vs. Central Pacific Ry. Co., et al., #129.

John Breuner Co. vs. Central Pacific Ry. Co., et al., #130.

Burrell G. White, Esq.,
Attorney at Law,
Nevada Bank Bldg., 14 Montgomery St.,
San Francisco, Cal.

Dear Sir:

As we do not intend to file a motion to dismiss the actions above referred to, the papers in which were served on September 4th, 1914, we shall be obliged if you will sign the enclosed stipulations, extending

time of answer to and including October 20, 1914.

(Enc.) Very truly yours,

DEVLIN & DEVLIN."

That affiant in reliance upon the statement contained in said letter that defendant did not intend to file a motion to dismiss the actions referred to in said letter, signed the stipulations referred to in said letter and delivered the same to said Messrs. Devlin & Devlin.

That on September 29, 1914, said Messrs. Devlin & Devlin caused to be delivered to affiant a letter in words and figures as follows:

"Subject:

IN RE: W. A. CURTIS

vs.

CENTRAL PACIFIC RAILWAY CO.—No. 101

Burrell G. White, Attorney at Law,

Nevada Bank Bldg., 14 Montgomery St.,

San Francisco, Cal.

Dear Sir:

The motion to strike out parts of answer and motion for further and better particulars in the above-entitled action will be on the calendar in the United States District Court (2nd Division) on October 5th. Mr. William H. Devlin, who has charge of the matter, is at home ill and we should be obliged if you would consent to same being continued to October 26th.

Please advise, and oblige,

Very truly yours,

DEVLIN & DEVLIN." [124]

In reply to said letter affiant caused to be delivered to Messrs. Devlin & Devlin a letter in words and figures as follows:

"SUBJECT:

CURTIS

vs.

CENTRAL PACIFIC RAILROAD COMPANY.

DEVLIN and DEVLIN,

Attorneys at law,

Sacramento, Cal.

Dear Sirs:—

Your letter of September 29th, 1914, has been received. I regret to learn of the illness of Mr. Devlin. Of course, under the circumstances, hearing of the motion will not be urged on October 5th, if Mr. Devlin is ill and cannot be present. It will therefore be understood that the matter will be continued to the next calling of the Calendar. The continuance will be with the further understanding that the motion will be heard at the next calling of the Calendar, and that no further continuance will be asked.

In connection with this matter, and the possibility of delay, I am reminded of an understanding, which I have with Mr. William H. Devlin, that when it comes to a trial the same may be set down for hearing at as early a date as may be agreeable to the Court, and that no opposition to such a setting and time of trial by the defendants will be made.

If these matters be agreeable to you, please advise by return mail.

Very truly yours,

BURRELL G. WHITE."

That in reply to said last mentioned letter, Messrs. Devlin & Devlin caused to be delivered to affiant a letter in words and figures as follows: [125]

October 1, 1914.

"SUBJECT:
CURTIS vs.
CENTRAL RY. CO. et al.
Burrell G. White, Esq.,
Attorney at Law,
Nevada Bank Bldg.,
San Francisco, Cal.

Dear Sir:

Acknowledging receipt of yours of the 30th ult.: It is understood that the matter pending on October 5th, will be continued until the next calling of the calendar, at which time we shall be ready. So far as the trial of the case is concerned, there will be no effort, on our part to delay it. It is among the possibilities that Judge Van Fleet will prefer to try the case at Sacramento next April.

Very truly yours,
DEVLIN & DEVLIN."

That by reason of the statements contained in the foregoing letters and telegrams, complainants herein have relied upon the same as being the consent of the defendants to a trial of said suits at San Francisco "at as early a date as may be agreeable to the Court, and that no opposition to such a setting and time of trial by the defendants would be made."

That on May 28, 1915, at Sacramento, the above entitled suit and similar suits pending herein were continued until the July term at San Francisco, after

the Court had said *that there would be in San Francisco in July an outside judge or judges who would be ready to dispose of the cases.*

Attorneys for the defendants were present in Court and made no objection whatever to said continuance, and in reliance upon the statements contained in the letters and telegrams herein above copied, the attorney for complainants accepted the order of continuance as an order for trial at San Francisco.

That on the second Monday of July 1915, affiant appeared in the above-entitled Court and moved the setting of said suits for trial. Said motion was passed on the sole ground that various motions were pending which left the pleadings unsettled. No objection **[126]** whatever was made on any other ground to the setting of said suits for trial.

That prior to the hearing at Sacramento on May 28, 1915, at which time the order continuing the above-entitled suit until July was made, it had been agreed between Mr. William H. Devlin, affiant, and certain of the complainants in the suits pending herein, similar to the above-entitled suit, that the Court would be requested to continue the trial of all of said suits to a term of said court at San Francisco, not later than the November term, 1915.

That the ruling of the Court, upon the motion to transfer said suits to the law side of the court, relieved said attorneys of the necessity of moving for a continuance of the trials.

Affiant is informed and believes that said understanding and agreement was first discussed between

said Mr. William H. Devlin, and one Dwight H. Miller, an officer of Miller-Enright Company, and Miller Realty Company, a corporation, and complainant in one of the said suits, upon the initiative of said William H. Devlin; said Miller reported to said White the substance of the suggestions of said William H. Devlin for a continuance of the trial of said suits;

That affiant thereupon met said William H. Devlin in the offices of Devlin & Devlin, on May 28th, 1915, at 9:30 A. M., and discussed the matter of the proposed continuance which said William H. Devlin had discussed with said Miller, and said William Devlin then and there agreed that said suits then pending for trial at Sacramento might be continued for trial at San Francisco not later than the November term, 1915, subject to the convenience of the Court, and it was further agreed that motions pending for hearing at 10:00 o'clock of said date should be heard and disposed of;

That at noon, May 28th, 1915, said William H. Devlin met with [127] said Miller, and one Scott F. Ennis, and said White, and at said meeting the conversations and agreements above referred to were fully rehearsed in detail and agreed to by all parties present.

That the trial of said suits at San Francisco at a term not later than the November term, 1915, was conditioned solely upon the defendants mentioned carrying out certain proposals, made by said William H. Devlin in behalf of said defendants, before the calling of the July Calendar, 1915, in said Court,

which said proposals said defendants have not carried out.

BURRELL G. WHITE.

Subscribed and sworn to before me, this 18th day of November, 1915.

[Seal] ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

[Filed November 18, 1915.] [128]

Affidavit of Dwight H. Miller

State of California,

City and County of San Francisco,—ss.

Dwight H. Miller, being first duly sworn, deposes and says:

That he is now and at all the times herein mentioned was, a resident of the city of Sacramento, state of California. That he is an officer and one of the managing directors of Miller, Enright Co., and Millen Realty Co., complainant in equity suit No. 93 pending in the above-entitled court;

That on May 27, 1915, at Sacramento, California, he discussed with Mr. William H. Devlin, one of the attorneys for the defendants in the above-entitled suit, the question of trial of the above-entitled suits and other similar suits then pending for trial at Sacramento in the above-entitled court;

That said Devlin mentioned to affiant certain things which the said defendants were willing to do and urged said proposals as reasons why said suits should not be tried at Sacramento at that time;

That affiant reported to Burrell G. White, attorney for [129] complainants in said suits, the substance of said conversation with said Devlin, and said White said to affiant that he would agree to said proposals made by said Devlin to affiant, and that he would consent to a continuance of the trials then pending, if said Devlin would agree to a trial of said suits at San Francisco at a time not later than the November term, 1915, in the event the said proposals made by said Devlin were not carried out;

That at noon, May 22, 1915, affiant met said Devlin, said White, and one Scott F. Ennis, and then and there the proposals made by said Devlin were fully rehearsed, and at said meeting it was understood and agreed by and between all of the said parties last mentioned, that said suits would be tried at a time not later than at the November term, 1915, at San Francisco, if the proposals above referred to were not carried out in the meantime by the defendants.

That the said proposals above referred to have not been carried out by said defendants.

DWIGHT H. MILLER,

Subscribed and sworn to before me, this 17th day of November, 1915.

[Seal] ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

[Filed November 18, 1915.] [130]

Affidavit of Scott S. Ennis.

State of California,
City and County of San Francisco,—ss.

Scott F. Ennis, being first duly sworn, deposes and says:

That he is now, and at all the times herein mentioned was, a resident of the city of Sacramento, State of California, and an officer, and one of the managing directors of Ennis-Brown Company, a corporation and complainant in equity suit No. 88, pending in the above-entitled court.

That on May 28, 1915, affiant was informed by one Dwight H. Miller that Mr. William H. Devlin had made the proposal to said Miller that the above entitled, and other similar pending in the above entitled court should not be tried at Sacramento at that time.

That said Miller had reported to Burrell G. White, attorney for complainants in said suits, the proposals made by said Devlin, and that said White had approved of the same provided suits then pending should not be delayed as to trial beyond the November term calendar of said court at San Francisco, in the event the things to be done by the defendants as proposed by said Devlin were not carried out. [131]

That affiant agreed to abide by said understanding, and so advised said White.

That at noon, May 28, 1915, affiant met said Miller, said Devlin and said White, and then and there the proposals made by said Devlin were fully rehearsed

and it was then and there agreed that, if the defendants did not do the things proposed by said Devlin, the above entitled and other similar suits pending herein should be tried at a time not later than the November term calendar of said court at San Francisco.

That defendants have not carried out the proposals so made by said Devlin.

SCOTT F. ENNIS,

Subscribed and sworn to before me, this 17th day of November, 1915.

[Seal] J. K. DAGGETT,
Notary Public.

[Filed November 18, 1915.] **[132]**

Defendants' Objections to Complainant's Praecipe and Defendants' Praecipe for Transcript of Record on Appeal.

To the Above-named Complainant, and its Attorney, and to the Clerk of the Above-entitled Court:

Now come the above-named defendants and object to the inclusion in the transcript, asked for by the complainant by a notice, dated and filed December 23d, 1915, of any of the papers, records or proceedings therein, except the following, to wit:

I.

Amended bill of complaint.

II.

Amended to and of the amended bill.

III.

Motion of the defendants to dismiss the same.

IV.

Order, dated December 1st, 1915, granting defendants' motion to dismiss.

V.

Decree, entered December 20th, 1915, dismissing suit. [133]

VI.

Petition for order allowing appeal.

VII.

Assignment of errors.

VIII.

Order allowing appeal and fixing bond.

IX.

Bond on appeal.

X.

Complainant's praecipe for a transcript of record.

XI.

Citation on appeal.

Said objections are made upon the ground that only the papers and records above named are material, for the purpose of appeal from the judgment dismissing the action.

In the event, however, that the objections are not well taken, or are not regarded, then you, the above-named clerk, are hereby notified that the above-named defendants, being the appellees, desire additional portions of the record incorporated in the transcript, requested by the above-named complainant, as appellant, by notice to you, filed December 23d, 1915, and as hereinbefore more particularly set forth, such additional portions of the record, as so desired, being indicated as follows, to wit:

The above-named defendants, being such appellees, desire all the records, papers, documents, orders of the above-entitled court and proceedings in the above-entitled case to be set forth in the said transcript, and, in order that the said matters, which are omitted from the praecipe of the complainant may be specifically enumerated, the following additional portions of the [134] record to be incorporated into the transcript are desired by the said defendants, being the appellees herein:

I.

Notice of motion, dated September 21st, 1914, to strike out parts of answer, in case of Curtis vs. C. P. Ry. Co. et al., #101—In Equity.

II.

Order of October 30th, 1914, denying motion to strike out parts of answer and granting motion for further and better particulars of answer, in case of Curtis vs. C. P. Ry. Co. et al., #101—In Equity.

III.

Stipulation, dated November 4th, 1914, for time to amend answer, in case of Curtis vs. C. P. Ry. Co. et al., No. 101—In Equity.

IV.

Defendants' first amended answer, dated November 21st, 1914, in case of Curtis vs. C. P. Ry. Co. et al., #101—In Equity.

V.

Opinion on order denying complainant's motion for further and better particulars entered December 23d, 1914.

VI.

Notice of motion, dated December 29th, 1914, to

review and vacate order.

VII.

Notice of motion, dated January 26th, 1915, for further and better particulars of answer, in case of Curtis vs. C. P. Ry. Co. et al., #101—In Equity.

VIII.

Notice of motion, dated January 29th, 1915, for leave to amend twelfth defense in first amended answer, in case of Curtis vs. C. P. Ry. Co. et al., No. 101—In Equity.

IX.

Order of February 15, 1915, granting leave to amend twelfth defense in first amended answer and denying motion for further and better particulars of twelfth defense of answer, in case of Curtis vs. C. P. R. Co., et al., No. 101—In Equity. **[135]**

X.

Defendants' second amended answer, dated February 26th, 1915, in case of Curtis vs. C. P. Ry. Co., et al., #101—In Equity.

XI.

Notice of motion to transfer cause to law side, dated June 12th, 1915.

XII.

Notice of motion for further and better particulars, dated June 12th, 1915.

XIII.

Amendment to bill, filed June 21st, 1915.

Stipulation, dated July 1st, 1915, that motions to transfer, to dismiss and for further particulars be taken with reference to the complaint as amended June 21st, 1915.

XIV.

Notice of motion, dated July 1st, 1915, for further and better particulars of paragraph IX added to bill by amendment.

XV.

Order, entered July *1st*, 1915, that motion be taken to complaint as amended on June 21st, 1915.

XVI.

~~Affidavits of E. A. Carpenter, Scott F. Ennis, George K. Rider and F. B. Adams, each dated May 24th, 1915, and all relating to location and physical conditions of property described in complaint.~~

XVII.

Affidavit of Wm. H. Devlin, dated November 15th, 1915, relating to setting of cause for trial, in case of Curtis vs. C. P. Ry. Co. et al., # 101—In Equity.

XVIII.

Affidavits of Burrell G. White, Dwight H. Miller and Scott [136] F. Ennis, all served on November 19th, 1915, and all relating to setting of cause for trial, in case of Curtis vs. C. P. Ry. Co. et al., #101—In Equity.

XIX.

Defendants' praecipe for making up transcript.

Dated December 31st, 1915.

E. J. FOULDS,
DEVLIN & DEVLIN,
Attorneys for Defendants.

Due and personal service hereof by copy admitted this 3d day of January, 1916.

BURRELL G. WHITE,
Attorney for Complainant.

[Filed January 3, 1916.] [137]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred thirty-seven (137) pages, numbered from 1 to 137, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $75.30; that said amount was paid by Burrell G. White, Esq., attorney for complainant; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 6th day of January, A. D. 1916.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Ten-cent Internal Revenue Stamp. Canceled Jan. 6, 1916. J. A. S.] [138]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Central Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from date hereof, to wit, on the 26th day of January, 1916, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, wherein Ennis-Brown Company, a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 27th day of December, A. D. 1915.

WM. C. VAN FLEET,
Judge of United States District Court. **[139]**

[Endorsed]: No. 88. In the District Court of the United States, for the Northern District of the State of California. In Equity. Ennis-Brown Company,

a Corporation, Complainant, vs. Central Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Defendants. Citation on Appeal.

Service and receipt of a copy of the within Citation on Appeal is hereby admitted this 27th day of December, 1915. Devlin & Devlin, E. J. Foulds, Attorneys for Defendants.

Filed Dec. 27, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2729. United States Circuit Court of Appeals for the Ninth Circuit. Ennis-Brown Company, a Corporation, Appellant, vs. Central Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed January 6, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

Order Extending Time to File Record.

Good cause appearing therefor, it is hereby ordered that the appellant may have to and including the 8th day of January, 1916, within which to file his record

on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 6, 1916.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: No. 2729. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Jany. 8, 1916, to File Record Thereto and to Docket Case. Filed Jan. 6, 1916. F. D. Monckton, Clerk.

[Stipulated Directions as to Contents of Printed Record on Appeal.]

To the Honorable F. D. MONCKTON, Clerk of Said Court:

You are requested to omit from the printed record of said case the following portions of the record heretofore filed therein, viz.:

1. The title of the court and cause in each and every document and proceeding except in the Bill of Complaint and the Decree.

2. All verifications of pleadings and to insert in each case in lieu thereof "(Verified)."

3. All endorsements, except date of filing.

4. Affidavit, pages 70–72, inclusive.

5. Notice of Motion to Strike, pages 73–74, inclusive.

6. First Amended Answer, pages 77–87, inclusive, said first amended answer being identical with the original answer except that on page 6 of said original

answer, in the 6th line of the second paragraph the words "and that it" are omitted from the original answer and in the place and stead of said words there are in the amended answer the following words, "under, by and with the consent of the predecessors in interest of plaintiff, and that said railroad company."

7. Notice of Motion, pages 89–90, inclusive.

8. Notice of Motion, pages 93–95, inclusive.

~~9. Order, page 96.~~

10. Second Amended Answer, pages 97–107, inclusive, said second amended answer being identical with the original answer.

Dated February 4, 1916.

BURRELL G. WHITE,
Attorney and Solicitor for Appellant.
DEVLIN & DEVLIN,
E. J. FOULDS,
Attorneys and Solicitors for Appellees.

[Endorsed]: No. 2729. United States Circuit Court of Appeals, Ninth Circuit. Ennis-Brown Company, Appellant, vs. Central Pacific Railway Co. et al., Appellees. Stipulated Directions as to Contents of Printed Record on Appeal. Filed Feb. 7, 1916. F. D. Monckton, Clerk.